Provisional

For participants only

3 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3427th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 11 July 2018, at 10 a.m.

Contents

Protection of the environment in relation to armed conflicts (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

GE.18-11637 (E) 160718 030818

1811637

Please recycle

Present

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

The Chair invited the Commission to resume its consideration of the first report of the Special Rapporteur on protection of the environment in relation to armed conflicts.

Mr. Nguyen said that one of the primary purposes of the report was to clarify the protection of the environment in situations of occupation with a view to filling the existing gap in the law of occupation, where provisions on environmental protection were mostly indirect. The Special Rapporteur had faced challenges due to the requirement not to seek to modify the law of armed conflict and developments in the law of armed conflict in conjunction with international humanitarian law, international human rights law, international environmental law and other branches of law. The concepts of "occupation" and "environment" needed to be considered in light of the terms "post-armed conflict" and "natural environment" used in the reports of the former Special Rapporteur on the topic, Ms. Jacobsson. In addition, there was a need for consistency in the use of the terms "law of occupation", "law of armed conflict" and "law applicable in armed conflict".

There were various definitions of the concept of occupation, from article 42 of the Regulations concerning the Laws and Customs of War on Land (the Hague Regulations) of 1907 to decisions of the International Tribunal for the Former Yugoslavia and the Eritrea-Ethiopia Claims Commission and the 2016 commentary of the International Committee of the Red Cross on common article 2 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the First Geneva Convention). Traditionally, in the law of armed conflict, "occupation" involved invasion and placing the occupied territory under the authority of a hostile army which met with no armed resistance. However, the concept of occupation should be updated to reflect recent conflicts, as hostilities could sometimes continue even when there was no armed resistance. In some conflicts, such as the Viet Nam war or the situation in the Gaza Strip, the occupying Power had had control in the daytime, while resistance groups had exercised *de facto* control at night. The capacity of occupying States to comply with their obligations to protect the environment of occupied territory was further complicated by the mix of international and non-international armed conflicts.

Generally speaking, occupation could be defined as the presence of foreign armies in the territory of a State without the latter's consent. The occupying force could be the army of a State or coalition of States, or even an army placed at the disposal of the United Nations for the purpose of maintaining international peace and security. The latter scenario — in which an occupying army was at the disposal of an international organization — was potentially a new subject of the law of armed conflict and should be considered in the context of the current topic.

Control over some parts of an occupied territory could be exercised by a local surrogate acting on behalf of the occupying State, but draft principles 19, 20 and 21 focused only on the obligations of occupying States. In his opinion, the draft principles should address the different obligations of occupying States and other parties during occupation. The post-conflict phase of a conflict covered the whole occupation process, regardless of whether it was short or prolonged in duration. He proposed that the neutral terms "occupying Power" or "occupying administrator" should be used instead of "occupying State" in the draft principles. He believed that Mr. Park was also of the view that a suitable term should be found to replace "occupying State".

In her second report on the topic (A/CN.4/700), the previous Special Rapporteur had noted that situations of occupation were not only confined to the post-conflict phase of armed conflict. While the law of occupation was broader than the law of armed conflict, situations of occupation, as part of the post-conflict phase, were covered by the law of armed conflict. In that sense, he agreed with the Special Rapporteur's assertion in paragraph 27 that "the law of occupation is a specific subset of the law of armed conflict". Accordingly, the legal consequences of occupation, such as compensation for environmentally harmful actions during the occupation, could be dealt with under the rules of the law of armed conflict even if the occupation had ended. A good example of that was

the processing of claims by the United Nations Compensation Commission for the purposes of awarding compensation for losses resulting from the Iraqi invasion and occupation of Kuwait. That point should be taken into consideration in order to ensure consistency in the use of terms by the two special rapporteurs and to avoid fragmentation of the law. Draft principles 19 to 21 should be aligned with draft principle 2, which stipulated that "the present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict".

The law of armed conflict, which predated environmental law, focused on the protection of individuals. The Special Rapporteur had made an excellent analysis of the links between the law of armed conflict and humanitarian law, human rights law and environmental law in the sections of her report on the right to health and the sustainable use of natural resources. From the point of view of sustainable development, the right to live in a "clean environment" must now be ensured in all situations, even in armed conflicts. The obligation to protect the environment and promote sustainable development was crystallized in multilateral conventions and the practice of States. The report should have included more references to multilateral agreements related to sustainable development, such as the 1974 Charter of Economic Rights and Duties of States, the Johannesburg Declaration on Health and Sustainable Development, the United Nations Millennium Declaration and the outcome document of the United Nations Conference on Sustainable Development. The obligation to ensure environmental protection and sustainable development remained unchanged regardless of any change in administration. Permanent sovereignty over natural resources and the right of self-determination could not be violated even in a situation of occupation. In view of that, he supported the Special Rapporteur's assertion that the occupying State had a general obligation to respect the environmental laws and institutions of the occupied territory and to take environmental considerations into account in the administration of such territory. The occupying Power could modify the existing laws and institutions of the occupied territory only for the purpose of improving the living environment of the occupied population.

Armed conflicts adversely affected the environment of the territories inhabited by local peoples. In the interplay of humanitarian law, human rights law and environmental law, environmental issues related to armed conflicts could not be limited to the "natural environment", the term used in a number of the draft principles. A dictionary definition of "environment", the term used in the other draft principles, said it was "the surroundings or conditions, including natural resources, natural environment and cultural heritage, in which a person, animal, or plant lives or operates". In that sense, a reference to the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage could be included in the context of protection of the environment in situations of occupation.

Draft principles 19 to 21 regulated the activities undertaken in situations of occupation. Though occupation might be considered part of the post-armed conflict phase, the termination of occupation did not mean that that phase had ended. Therefore, the Special Rapporteur should consider the appropriate place for draft principles 19 to 21 in relation to draft principles 14 to 18, which dealt with "Principles applicable after an armed conflict" and which had already been provisionally adopted. In her introduction, the Special Rapporteur had suggested that certain draft principles addressing post-conflict situations, particularly draft principles 15 to 18, were also relevant to situations of occupation. Mr. Park had also suggested that the draft principles in parts two and three would apply *mutatis mutandis* in a situation of occupation. If it was decided to separate the principles applicable to situations of occupation, the reasons for doing so should be given in the commentaries.

Turning to the draft principles themselves, he said that he had no objection to draft principle 19 (1), which stipulated that environmental considerations must be taken into account by the occupying State in the administration of the occupied territory. That obligation should apply to both temporary and prolonged occupations. The draft principle seemed to provide for the situation of occupation of the whole territory by the occupying State and did not cover the, albeit rare, scenario of occupation by armed peacekeeping forces placed at the disposal of the Security Council. In that respect, the relationship between draft principles 7 and 8 and draft principles 19 to 21 should be clarified, and the term "State" could be replaced with "Power" so as to cover all possible scenarios. The

obligation to take environmental considerations into account in the activities of occupying Powers in the occupied territory must extend to any adjacent maritime areas and the airspace over the occupied territory and the adjacent maritime areas. Consequently, draft principle 19 (1) could be amended to read: "Environmental considerations shall be taken into account by the occupying Power in the effective administration of the occupied territory, including in any adjacent maritime areas and airspace over which the territorial State is entitled to exercise sovereign rights."

Draft principle 21 referred to transboundary environmental pollution but did not cover situations of partial occupation in which the environmental damage could spread to the unoccupied part of the territory. The obligation to cooperate to prevent, reduce or control any transboundary environmental pollution between occupying Powers, other relevant States and organizations in specific cases should also be covered.

Concerning future work, he agreed with the Special Rapporteur that the second report should address certain questions related to the protection of the environment in non-international armed conflicts. In the administration of the occupied territory, the occupying Power was obliged to respect the sustainability principles adopted at the World Summit on Sustainable Development. Thus, the next report should propose new draft principles on other environmental practices such as the precautionary principle and the polluter-pays principle. Control and coercive measures relating to environmental quality should also be addressed, as should the question of compensation for environmental harm caused by the actions of the occupying Power, such as the use of nuclear weapons, during and after a conflict.

In conclusion, he supported sending all the draft principles to the Drafting Committee for further review and improvement.

Mr. Murase said that the Special Rapporteur's report was well researched and well structured. It might be helpful to remind readers that, while the draft principles were supposed to cover both international and non-international armed conflicts, the law of occupation was applicable only to international armed conflict and, as such, draft principles 19 to 21 were not applicable to non-international armed conflict.

In applying the law of occupation, a clear distinction should be drawn between "belligerent occupation" and "pacific occupation". The former related to the period during an armed conflict, while the latter was relevant to the post-conflict phase. Belligerent occupation was generally considered incidental to military operations, including hostilities, and its legitimate objective was to weaken the military forces of the enemy. It was necessary to recognize that, while certain inhumane weapons and warfare were prohibited, *jus in bello*, or the law of armed conflict, was essentially a body of rules that authorized killing and injuring enemies on the battlefield. Protection of the environment in such a context was a remote concern, if not irrelevant to the parties engaged. If military necessity prevailed over environmental considerations, parties to an armed conflict could be permitted to employ any means of warfare available — including in a situation of belligerent occupation — unless specifically prohibited by the law of armed conflict.

In contrast, pacific occupation was that which continued after the general close of military operations. In such situations, the occupying State could derogate from the application of the general law of occupation by concluding a special agreement with the occupied State to regulate post-conflict matters. Such occupation was not regarded as belligerent because its objectives were no longer to weaken the military forces of the enemy. For example, towards the end of the Second World War, Okinawa, the southern archipelago of Japan, had been under the belligerent occupation of the United States of America from June to August 1945. During those two months, the war between mainland Japan and the Allied Powers had continued. The war had ultimately ended with the acceptance by Japan of the Potsdam Agreement, essentially an armistice agreement, which had also marked the beginning of pacific occupation. In other words, the Allied occupying Powers had been able to derogate from their obligations under the law of occupation by concluding the Potsdam Agreement with Japan. Pacific occupation had lasted until 1952. A similar case was the occupation of Iraq in 2003, when the Coalition Provisional Authority of the occupying Powers had derogated from the general law of occupation on the basis of

Security Council resolution 1483. In that respect, he had found Sir Michael Wood's second statement to the Iraq Inquiry in the United Kingdom useful.

Neither the Potsdam Agreement nor Security Council resolution 1483 had foreseen that the parties to the armed conflicts in question would continue hostilities. Rather, those instruments had been intended to regulate post-conflict situations. Thus, while belligerent occupation should be considered in the second temporal phase of the conflict (during the armed conflict), pacific occupation should be considered in the third phase (post-armed conflict), and was related to draft principle 14, on "peace processes". It seemed to him that the Special Rapporteur's argument might be more pertinent to pacific occupation than belligerent occupation, although she based it on instruments related to the latter. He would therefore urge her to consider formulating separate provisions on belligerent occupation on the one hand and pacific occupation on the other.

The concept of "occupation" was relevant only to land warfare, and not necessarily to air and sea warfare. He therefore disagreed with the Special Rapporteur's statement in the last sentence in paragraph 21 of the report. He did not believe that the authority established in a certain land territory by an occupying State *ipso facto* extended to the adjacent sea areas and airspace. That point was clarified in article 42 of the Hague Regulations, which provided that: "The occupation extends only to the territory where such authority has been established and can be exercised". In that respect, even if the occupying State exercised effective control over the adjacent sea and airspace of the occupied areas, the scope of application of the law of occupation normally did not extend to the sea and airspace.

The underlying idea of the law of occupation was the distinction between the dominium of the occupied State and the imperium of the occupying State. While a State normally possessed both imperium and dominium as components of its sovereignty, it lost imperium when it was occupied by a foreign State. Although the occupying State exercised *de facto* authority or jurisdiction over certain land territory, it could not claim *de jure* title and sovereignty over that territory. The law of occupation was intended to regulate such exercise of *de facto* authority. Thus, unlike the legitimate Government of a State, whose sovereignty *ipso facto* extended also to its territorial sea and airspace even if it did not exercise authority over those areas, the territorial sea and airspace being "appurtenances" to the land, the occupying Power had no such extension of power. Even if the occupying State exercised *de facto* authority over the adjacent sea or airspace, the territorial scope of the law of occupation did not extend to those areas unless the "population" of the occupied State was to be found in those areas. Thus, in his view, the last phrase proposed in draft principle 19 (1), "including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights," should be qualified or perhaps deleted.

It should be noted that the particular circumstances of an occupation might substantially limit the protection which could be afforded to the environment. Article 43 of the Hague Regulations required the occupant to respect the laws of the occupied country "unless absolutely prevented" from doing so, whereas article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) allowed an occupying Power to repeal or suspend the laws of the occupied territory in some cases. Hence it could suspend the environmental laws of the occupied State in order "to ensure the security of the Occupying Power, [and] of the members and property of the occupying forces or administration". Instances of such suspension abounded in situations of belligerent occupation. For that reason, draft principle 19, which was largely applicable to pacific occupation after an armistice, might have to be qualified in respect of belligerent occupation. He was not in favour of evolutionary interpretation and wondered on what treaty provision the draft article was purportedly based.

Turning to chapter III of the report, he considered that, while some rights embodied in human rights instruments, such as the right to private and family life and the right to property, were connected with the protection of the environment, they were more in the nature of peacetime considerations and their applicability to situations of armed conflict should not be overemphasized. In that respect, he drew attention to the passage in the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in which the International Court of Justice had held that the protection

offered by human rights conventions did not cease in cases of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. Both the latter and the European Convention on Human Rights permitted derogations from the right to private and family life. Those derogations were, however, restricted by the principles of proportionality, non-discrimination and consistency. For that reason, it could be said that the application of human rights norms relating to the environment was limited in situations of occupation. He was puzzled by the lack of any reference to human rights law in the three draft principles proposed by the Special Rapporteur and wondered if they should include a provision indicating that human rights law had a role to play in complementing the law of occupation for the protection of the environment of the occupied territory.

With regard to draft principles 20 and 21, he noted that the draft articles on the effects of armed conflicts on treaties were of relevance only to the potential applicability of peacetime norms, but were silent on the exact extent of their applicability to actual armed conflicts. The Commission should therefore try to identify the exact extent to which a particular norm of international environmental law could be applied in a manner consistent with the law of occupation. Since sustainable development was essentially a concept that sought to establish a balance between economic development and environmental protection and since the law of belligerent occupation was not premised on economic development, that notion was inappropriate to the draft principles.

According to article 6 of the articles on responsibility of States for internationally wrongful acts, the territorial State was responsible for acts of a foreign Government's organ only if the latter exercised elements of the governmental authority of the sovereign State. He therefore wondered whether responsibility for breaches of environmental law should be allocated to the occupying or the occupied State. The commentary to the draft article would seem to suggest that the situation would be different depending on whether occupation was belligerent or pacific.

He felt strongly that it was important to consider phase II situations (during the conflict) and phase III (post-conflict) situations separately. A situation also arose subsequent to a post-conflict situation that might be termed a phase IV situation, such as that found in Okinawa, where United States military bases were causing such environmental problems that further efforts needed to be made by the Governments of the United States and Japan to remedy the situation.

He did not think that there had been any precedents with regard to international organizations' involvement in occupation. After the signing of the Military Armistice Agreement in 1953, the United Nations had acted as an administrative authority but not as an occupying Power in part of Korea, as it had in Angola, Cambodia and the former Yugoslavia. The Economic Community of West African States had intervened in Liberia and Côte d'Ivoire, but never as an occupying Power. North Atlantic Treaty Organization (NATO) forces had formed the core of peace support operations in the former Yugoslavia, but not as an occupying Power.

He was in favour of referring all three draft principles proposed by the Special Rapporteur to the Drafting Committee.

Ms. Galvão Teles said that she supported the approach to the topic adopted by the Special Rapporteur in her first report. The question of complementarity with other relevant areas of international law could be addressed in the draft principles or fleshed out in the commentary to them on the basis of chapters II and III of the report. Chapter II, on protection of the environment in situations of occupation through international human rights law, where the Special Rapporteur had focused on the right to health, could have dealt with other human rights which could likewise be affected in such situations, especially in view of the fact that article 55 of Protocol I additional to the Geneva Conventions of 1949 also referred to the survival of the population.

Turning to draft principles 19 to 21, she noted that the report had largely succeeded in identifying and clarifying the guiding principles and obligations relating to the protection of the environment under international law in situations of occupation. Generally speaking, it was unnecessary to define "occupation" in the body of the draft principles, as it could be

defined in the commentary on the basis of the cumulative conditions listed in paragraph 23 of the report. It would be more appropriate to use the term "occupying Power" rather than "occupying State" and, for the sake of consistency with the other draft principles which had already been provisionally adopted by the Commission or the Drafting Committee, draft principles 19 to 21 should have titles.

The redrafting of paragraph 1 of draft principle 19 suggested by the Special Rapporteur in her oral introduction improved the text. The commentary to the draft principle should explain what exceptional circumstances would be deemed to prevent an occupying Power from respecting the occupied territory's environmental legislation as required by international humanitarian law. In order to cover the occupation of non-self-governing territories and similar situations, it would be advisable, in the second part of paragraph 1, to opt for more general wording that would avoid the terms "territorial States" and "sovereign rights". In order to align paragraph 2 with the existing rules of international humanitarian law, it would be wise to replace the expression "the legislation of the occupied territory" with "the laws in force in the occupied territory".

She agreed with the current text of draft principle 20, which should, however, also make it clear that the occupied territory's wealth and natural resources should be exploited and administered for the benefit of the local population and not of the occupying Power. Material in support of that proposition could be found in paragraph 37 of the report.

Although she concurred with the general objective of draft principle 21, its language should be brought more into line with the findings of the International Court of Justice in paragraph 29 of its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*. It could read: "An occupying power shall ensure that activities in the occupied territory respect the environment of other States or of areas beyond national control." That more general wording was part of the corpus of international law on the environment. The meaning of the phrases "shall use all the means at its disposal" and "do not cause significant harm" in the context of occupation could be analysed in the commentary.

She endorsed the Special Rapporteur's proposal regarding future work as outlined in paragraph 100 and agreed that an explanation of how the temporal approach could be applied to situations of occupation should be included in the commentary. Lastly, she was in favour of referring draft principles 19 to 21 to the Drafting Committee.

Mr. Petrič, referring to Mr. Murase's statement, said that the Kosovo Force (KFOR) had operated in Kosovo under Security Council resolution 1244 (1999) and had remained in the country until Kosovo declared its independence in 2008. During that period of time, the United Nations had acted as the *de facto* administration and had therefore also functioned as an occupying Power. Similarly, international organizations had been present in Afghanistan after the fall of the Taliban. The possibility that international organizations could act as occupying Powers should not therefore be ruled out.

Mr. Hmoud, referring to Mr. Murase's comments, said that Security Council resolution 1483 (2003), concerning Iraq, had called on all parties to comply fully with their obligations under international law, in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907. The latter were, of course, related to the applicability of the law of armed conflict and therefore to belligerent occupation. Security Council resolution 1546 (2004) had recognized the end of the occupation and the dissolution of the Coalition Provisional Authority. Security Council resolution 1483 (2003) had basically concerned the legality of the use of force in Iraq, which clearly affected the nature of the subsequent occupation.

Mr. Murase, referring to Mr. Hmoud's statement, said that Security Council resolution 1483 (2003) in fact had called upon the Coalition Provisional Authority to promote the welfare of the Iraqi people.

Mr. Murphy said that the Commission should be careful about how it characterized particular situations, including active situations such as the status of the armistice on the Korean Peninsula. Although the point raised was interesting, the Commission should avoid trying to resolve it in the commentary to the draft principles. On the broader issue of whether to couch the draft principles in language that covered international organizations as

well as States, consideration should be given to whether the Hague Regulations of 1907, the Geneva Conventions of 1949 and Protocol I additional thereto applied to international organizations by virtue of their terms or under customary international law.

Although most of the States that had commented on the topic within the Sixth Committee of the General Assembly had seemed to support the Commission's work to date, Czechia, the Russian Federation and the United Kingdom had expressed the view that, as the rules that the Commission had articulated were sufficiently well addressed in existing treaties, it was not adding anything of particular value. The Netherlands had expressed concern about broadening the topic beyond recognized existing rules of international humanitarian law, while the United States of America had urged extreme caution in assuming that anything other than international humanitarian law contributed to law in the area under consideration.

Chapter I of the Special Rapporteur's first report concerned the obligations of an occupying State under international humanitarian law with respect to environmental protection. It was useful that the Special Rapporteur had analysed the international humanitarian law emanating from the dominant sources of law in that area, namely the Hague Regulations of 1907, especially section III; the Fourth Geneva Convention, especially part III, sections I and III; and, for States party to it, Protocol I additional to the Geneva Conventions of 1949, especially article 69.

Chapter II of the report, which attempted to address the application of international human rights law to military occupation, was less successful. It remained ultimately unclear how human rights law altered or shed light on international humanitarian law with respect to occupation. Despite references to the possibility of evolutive interpretation, the report did not give a clear sense of how the propositions of the dominant sources of law could be said to have evolved, even with respect to issues of health. While no particular difficulty arose in terms of the text of the draft principles, which did not refer to human rights law, it was doubtful whether much of what was discussed in chapter II of the report should appear in the commentary.

Chapter III of the report addressed the role of international environmental law in situations of occupation. While that body of law featured in draft principles 20 and 21, it seemed that the rules it contained were being invoked without any real acknowledgement in the text of the draft principles of the unique situation presented by a military occupation. In particular, while the report acknowledged both the variety of circumstances that might exist with respect to military occupation, including its duration and the presence or absence of active hostilities, and the need for an occupying Power to take steps to protect its security, the draft principles seemed to take a "business as usual" approach in their application of international environmental law. It should always be borne in mind that military necessity might require peacetime rules, including in the area of international environmental law, to be set aside.

The amended version of draft principle 19 (1) that the Special Rapporteur had proposed in her introductory statement was an improvement on the version contained in her first report, which arguably expanded the concept of "occupied territory" to include areas that were not the sovereign territory of the occupied State. The standard articulated in paragraph 2 of draft principle 19, however, seemed too stringent. Article 43 of the Hague Regulations, on which it was based, had not really survived into contemporary international law, as acknowledged in the report. Article 64 of the Fourth Geneva Convention established a somewhat more lenient standard that allowed the occupying State greater discretion to modify or enact laws as necessary to provide for its own security and for orderly government and, most importantly, to fulfil obligations owed to protected persons in the occupied territory, including with respect to their health and welfare. Any standard adopted by the Commission should accord the occupying State sufficient flexibility to alter existing law to protect the civilian population in occupied territory, even in the case of pacific occupation. He suggested the following wording for the paragraph, to align it more closely with article 64: "An occupying State shall respect the laws in force in the occupied State pertaining to the protection of the environment, but may alter such laws as necessary to fulfil the occupying State's obligations to the population of the occupied territory, to

maintain the orderly government of the occupied territory, and to ensure the security of the occupying State."

While he sympathized with the overall objective of draft principle 20, the wording was problematic. Existing treaties addressing the issues it covered, especially the Hague Regulations, were mostly in the nature of prohibitions on what an occupying State could do, while the first part of draft principle 20 took a more proactive stance. It called upon the occupying State to "administer natural resources" and "ensure" sustainable use, which might be interpreted as an affirmative obligation on the occupying State to cut down forests, build hydroelectric dams, harvest fisheries, and so on, rather than leaving such resources alone unless they were needed for the purposes of the military occupation or the sustenance of the civilian population. The Commission should not advocate such action by an occupying State. Moreover, the call for an occupying State to ensure "sustainable use" might be read as precluding the use of non-renewable natural resources, such as minerals, oil and gas. In international environmental instruments, the term "sustainable use" was typically used when discussing oceans, biodiversity, fresh water, forests and other renewable resources. Applied in the present context, it would not be consistent with the laws of war, which allowed the occupying State to extract non-renewable resources if necessary to cover the expenses of the occupation or to meet the needs of the civilian population.

The reference in the last clause of draft principle 20 to minimizing environmental harm seemed misplaced. If taken seriously, the clause would arguably mean that there should be no use of natural resources at all, since environmental harm was caused whenever natural resources were used. In situations not involving armed conflict, the standard was correct; indeed, the whole point of the concept of "sustainable development" was not to minimize environmental harm but to balance such harm against the need of society and future generations to use natural resources and ecosystem services for public welfare. Neither the Declaration of the United Nations Conference on the Human Environment of 1972 (the Stockholm Declaration), nor the Rio Declaration on Environment and Development of 1992 (the Rio Declaration), nor the Sustainable Development Goals mentioned minimizing environmental harm. Moreover, in the context of a military operation, such a standard seemed particularly wrong because it appeared to deny the occupying State the ability to use natural resources in the occupied territory for the purposes allowed under the Hague Regulations of 1907, the Fourth Geneva Convention and Protocol I additional to the Geneva Conventions of 1949. Some of those concerns might be addressed by amending the text or including explanations in the commentary; if draft principle 19 were not adopted, however, draft principle 20 might not be needed at all.

The general thrust of draft principle 21 was unobjectionable, though the wording might be improved by the Drafting Committee. The phrase "all the means at its disposal", which was derived from a paragraph in the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and might therefore be appropriate and reasonable in peacetime, seemed less so in the context of a military occupation, especially one associated with ongoing hostilities. It was unreasonable to expect a belligerent engaged in active hostilities while occupying territory to divert "all the means at its disposal" to meet the objective of ensuring that activities in the occupied territory did not cause significant damage to the environment of another State or to areas beyond national jurisdiction. A better and more lenient standard might be to require an occupying State to "take all appropriate measures", echoing the wording of the Commission's 2001 draft articles on prevention of transboundary harm from hazardous activities. Alternative standards might focus on acting with due diligence, which had also been referred to in *Pulp Mills* and other cases and instruments. That said, the threshold of "significant" damage or harm, reflecting the draft articles on prevention of transboundary harm and used in other instruments, was appropriate.

With regard to future work on the topic, he supported the Special Rapporteur's intention of seeking to conclude the first reading of the draft principles in 2019, on the basis of a second report, but disagreed with Mr. Nguyen's suggestion that additional draft principles should be prepared on issues such as the polluter-pays principle, which could detract from the focus of the topic. The aim was not to restate the entire field of

international environmental law, particularly given that many of the rules established by such law did not operate in relation to armed conflict. He supported referring draft principles 19 to 21 to the Drafting Committee.

Mr. Rajput, expressing support for the draft principles proposed by the Special Rapporteur, said that much of the discussion in her first report was based on the application and operation of areas of international law other than humanitarian law, such as human rights or environmental law, in relation to an armed conflict. Due care must be taken in analysing the interaction of norms. The appropriate methodological approach was that taken by the International Court of Justice in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, in which the Court had discussed the relationship between the International Covenant on Civil and Political Rights and international humanitarian law. The Court had stated:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Accordingly, principles originating in other areas of law might apply but would be overridden by humanitarian law and would be subject to the peculiarities of the situation of conflict.

The law of occupation was the first obvious paradigm from which to identify the onus for protecting the environment after the end of hostilities, pending the transfer of sovereignty back to its legal and legitimate claimants. Article 42 of the Hague Regulations had been recognized as a rule of customary international law by the International Court of Justice in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, so its status should be respected. It required that authority should be "established" and "actually exercised" over a territory. Some took the view that even temporary loss of control did not change the character of occupation; the Court, however, had insisted on the fulfilment of both requirements, particularly the need for authority to be exercised in the territories claimed to be under occupation, as was clear from the *Armed Activities* case. The Court had also observed that the mere presence of a hostile army was insufficient to prove occupation under article 42 of the Hague Regulations and that there was a need to establish the actual exercise of authority, rather than the mere existence thereof. For the purposes of the present topic, more consideration should be given to when and where the responsibility to take adequate measures to protect the environment would be borne by the occupying State. Even when active hostilities ceased, it was not necessarily the case that the entire region would come under the effective control of the occupying State, and it was therefore advisable for the Commission to follow the threshold of effectiveness set by the Court, rather than the suggestion in the literature that occupation was unaffected by the loss of effective control over some parts of a territory. If an occupying State was to be held responsible for damage to the environment resulting from the actions of others who had effective control over a territory, it could serve as an incentive for such actors to destroy the environment.

The presence and exercise of actual and effective control was particularly important in situations of long-term occupation. Article 42 of the Hague Regulations did not stipulate any time period, and the consequences of occupation were bound to differ depending on how long the situation pertained. Long-term occupation, in particular, entailed the possibility of loss of effective control and damage being caused to the environment by actors other than the occupying State. The text of the draft principles should use the term "occupation" and the commentary should clarify that the elements of article 42 of the Hague Regulations, as interpreted by the International Court of Justice, should be satisfied.

He broadly agreed with the revised version of draft principle 19 (1) proposed by the Special Rapporteur in her introductory statement, but expressed concern over the words "entitled to exercise sovereign rights", which implied that the occupying State had some form of authority or power to exercise sovereign rights over maritime areas. A reference to the "effective exercise of sovereign authority" would be a more appropriate formulation. Article 42 of the Hague Regulations extended only to land territory, not maritime areas, although it could be argued that "territory" should be interpreted broadly and that the Commission should try to develop that area further, taking into account extension of control over maritime areas. At the same time, it was necessary for there to be effective occupation of those areas as well. The two tests articulated by the International Court of Justice would still need to be met.

In the light of the discussion in paragraphs 23 to 26 of the report, the Special Rapporteur was correct in deciding that there was no need to define or reconsider the use of the term "occupation", which would disrupt the relatively settled situation relating to article 42 of the Hague Regulations and the interpretation thereof by the International Court of Justice.

He supported draft principle 19 (2) in its current form. It might be tempting to assume that the imposition of greater obligations on occupying States would strengthen the protection of the environment. However, an occupying State was not the legitimate holder of sovereignty and should not be given excessive authority to legislate. The authority of an occupying State to legislate was rightly curtailed under humanitarian law. He sympathized with Mr. Murphy's suggestion, particularly in view of the fact that the United States of America had implemented measures to improve the protection of human rights in Iraq. In addition, it was possible that an occupying State might wish to introduce higher environmental standards that would have an adverse impact on the domestic economy of a particular territory. For that reason, the Commission should tread carefully. The commentaries would play a critical role in that regard.

With regard to the link drawn in the report between the protection of the environment and property rights under the law of occupation, it was important to clarify the meaning of article 55 of the Hague Regulations. Article 55 concerned public property only. At a stretch, the references in article 55 to forests and agricultural estates could be interpreted in the context of protection of the environment. But the Special Rapporteur had instead chosen to interpret a State's duty to "safeguard the capital" of the "properties" listed in article 55 as including a duty to protect natural resources, which were not mentioned in that article. That seemed a leap of interpretation too far. Nevertheless, the underlying concept in article 55, namely usufruct, could certainly be applied to natural resources. There was some State practice that supported such an interpretation. The concept of usufruct had an important role, as it determined the extent to which an occupying Power could exploit natural resources.

The Special Rapporteur's application of the principle of permanent sovereignty over natural resources to the protection of the environment in relation to armed conflicts was inappropriate. The resolutions that underpinned the principle of permanent sovereignty over natural resources were neither directly nor indirectly linked with the law of occupation or the law of armed conflict. They were instead linked with the economic independence of developing States, freedom from the interference of other States in economic matters and the right of host States to expropriate property owned by foreigners. In addition, permanent sovereignty over natural resources had nothing to do with looting or pillage, which were associated with a distinct area of humanitarian law emanating from article 47 of the Hague Regulations and article 33 of the Fourth Geneva Convention. The application of the principle of permanent sovereignty over natural resources would prevent an occupying State from exploiting natural resources at all, which would exceed the scope of usufruct as contained in article 55 of the Hague Regulations. The same was true of self-determination. The application of self-determination would prevent the occupying State from exploiting the natural resources of the territory even if the requirements of article 55 were met. The cases referred to in paragraph 35 of the report related to self-determination in general and not to the specific context of the exploitation of natural resources. The reference to self-determination in paragraph 122 of the *Legal Consequences of the Construction of a Wall in*

the Occupied Palestinian Territory, which was cited in footnote 140 of the report, related to the planned route of the wall and not to the exploitation of natural resources. There was very little to suggest that the International Court of Justice was dealing with self-determination in the context of natural resources in that case.

A link was made in the report between the protection of water resources and the protection of the environment. It was noted in paragraph 36 of the report that, as article 55 of the Hague Regulations applied only to public property, it covered water in public ownership but not that in private ownership. The distinction between the two was unclear. The specific circumstances would vary from one case to another, which would make it impossible to formulate any general policy recommendations. The treatment of water as immovable property was similarly problematic, as it was treated as movable property in some jurisdictions. In any case, it was not for the Commission to determine whether water constituted movable or immovable property in that context.

The link between the first sentence of article 53 of the Hague Regulations, which related to movable property, and the protection of the environment was also unclear. It was a leap of interpretation too far to claim that that sentence applied to natural resources because it included a reference to movable property and oil was movable once it had been extracted. As the last few words of the sentence made clear, it applied specifically to the movable property used for military operations rather than to movable property in general. Even if oil did constitute movable property, it would have to be used for military operations in order for the first sentence of article 53 to apply. In his view, it was better not to address such matters, which were fairly well settled in international humanitarian law, either in the text or in the commentary.

The same principles applied to the seizure of property. The report sought to establish a link between private property and the protection of the environment. However, the destruction of property was not always prohibited. Indeed, it was justified under article 53 of the Fourth Geneva Convention if it was "rendered absolutely necessary by military operations". Under article 147 of the Fourth Geneva Convention, the destruction of property attracted penal consequences if there was "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". In any event, such matters did not fall clearly within the scope of the topic and should not be taken further.

That discussion ultimately fed into draft principle 20, which declared that the occupying State should administer the natural resources in an occupied territory in a way that ensured their "sustainable use" and minimized environmental harm. However, a higher standard for the protection of natural resources was already set under article 55 of the Hague Regulations, which limited their use to usufruct. There was no universally accepted and recognized formula for determining "sustainable use", whereas usufruct was a clearer and well-settled principle. In his view, draft principle 20 was not really necessary. It interfered with and sought to weaken the pre-existing standard of usufruct, which was not in the interests of the occupied territory.

Turning to draft principle 21, he agreed that the principle of due diligence was appropriate for the regulation of transboundary harm. Due diligence was not an absolute standard but, by its very nature, was subjective and depended on the circumstances of a given situation. In addition, the term "due diligence" had a specific meaning in the context of environmental law. Regrettably, however, it had not been included in the text of draft principle 21. Thus, he proposed that the words "use all the means at its disposal" in that draft principle should be replaced with "exercise due diligence".

He supported referring all the proposed draft principles to the Drafting Committee.

Mr. Gómez-Robledo said that the Special Rapporteur had ensured a successful transition of the Commission's work on the topic. The Commission now had a consolidated draft, which owed a great deal to the previous Special Rapporteur, Ms. Jacobsson, who had continued to contribute to work on the topic since leaving the Commission.

Ms. Lehto's first report dealt with an essential aspect of the scope of the topic, namely the matter of whether the law that governed situations of occupation adequately

addressed the protection of the environment and, if not, what area of international law could be called upon to compensate for the shortcomings of the law on occupation.

The Special Rapporteur's analysis was rigorous. He agreed with her that the legal concepts central to the topic were, for various reasons, evolving. One reason was that the aspirations of formerly colonized peoples had already been incorporated into international law. That was the case for the rights that derived from the principle of permanent sovereignty over natural resources, which, in his view, had no limitations, as they predated even the existence of the State, the holder of those rights being the people or peoples.

The Geneva Conventions of 1949 and the Hague Regulations of 1907 did not fully address the tension that existed in contemporary situations of occupation between the obligation to ensure that the occupied population lived as normal a life as possible, in accordance with article 43 of the Hague Regulations, and the requirements of a hopefully brief period in which the State of the territory maintained its prerogative of sovereignty.

The situations of occupation mentioned in the report did not reflect the full extent of the phenomenon in the modern world. Such situations tended to be prolonged in duration, and the Commission should thus be attempting to develop new rules of international law. In addition to the occupation of Palestine, Jerusalem, the Golan Heights and southern Lebanon by Israel, there were many other situations of occupation or territorial dispute in which one party questioned the presence of another, belligerent or otherwise. They included Western Sahara in Africa; Abkhazia, South Ossetia and the territory of Nagorno-Karabakh in the former Soviet Union; the region of Kashmir, which was the subject of a dispute between India and Pakistan, and, some might argue, the region of Tibet in Asia; and Cyprus, the Serbian province of Kosovo and, more recently, Crimea in Europe. There were no occupied territories in the Americas, although they did have territorial delineation problems of their own.

Those were all examples of occupied or disputed territories in which the situation remained unresolved or in which there at least appeared to be no end in sight. Stagnation was the norm rather than the exception. In that context, he wondered whether the obligations of an occupying Power could be limited to the administration of the territory in the manner of a prudent usufructuary; whether a prolonged occupation was at all compatible with the requirements of sustainable development; to what extent an occupying Power should consult the population of the territory with regard to infrastructure or conservation work required to protect the environment; and to what extent some form of positive collaboration between the sovereign State and the occupied territory could be envisaged.

He was in no way suggesting that the Commission should opt for the "transformative occupation" mentioned in paragraph 46 of the report, and he endorsed the Special Rapporteur's description of the general obligations of an occupying State. In that regard, Security Council resolution 1483 (2003) had clearly authorized the occupying Powers to reform the institutions and administration of Iraq, once the fighting had ended. The Commission did not seem to have decided whether international organizations should be addressed in the draft.

The most fundamental question was whether the occupying State could and should promote the development of the occupied territory. That was not a theoretical question. In the context of a review of the situation in Western Sahara, the Sahrawi Arab Democratic Republic had questioned the validity of the licences that Morocco had granted to French companies for the exploitation and exportation of natural resources in the territory, which had resulted in a somewhat controversial legal opinion delivered by the United Nations Office of Legal Affairs.

In that context, it was important to consider not only situations of direct occupation, but also those of indirect occupation, namely an occupation that resulted from the establishment by the occupying Power of a puppet government to advocate the normalization of the occupation over time and eventually the secession of the occupied territory and the creation of a State under the authority of the occupying Power. Two examples were the establishment by Japan of so-called Manchukuo in the Chinese province of Manchuria and the establishment of the so-called Turkish Republic of Northern Cyprus.

The so-called Republic of Kosovo offered a further example. It had first been occupied by NATO and then, through the administration of the United Nations, had been "normalized" by the European Union.

He was not referring to situations that could be defined as belonging to the category of non-self-governing territories, which continued to be considered by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and might one day gain independence. Those situations did not fall within the scope of the topic.

In other situations, however, the idea should be to identify the rules that gave the occupying State guidance regarding the obligation to restore and maintain public order and civil life in circumstances that approximated peacetime.

In paragraph 62 of her report, the Special Rapporteur had rightly invoked the principle of proportionality, noting that the obligations of an occupying Power should be proportionate to the duration of their occupation. Therefore, the conservationist principle should be interpreted in the light of the needs arising from the duration of the occupation. It was in that context that the possibility of consulting the population should be raised.

It was worth bearing in mind the approach taken towards the management of natural resources in relation to indigenous communities. Of course, the protection of the environment of indigenous peoples was already addressed in draft principle 6, which established the obligation of the State to consult and cooperate with affected indigenous peoples for the purpose of taking remedial measures after an armed conflict.

But it was possible to go a little further. He suggested that the Commission should go back to the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which recognized a raft of rights for indigenous peoples and imposed obligations on States that could include compensation or the restitution of lands and resources. In addition, in 2016, the Organization of American States had adopted the American Declaration on the Rights of Indigenous Peoples.

If those obligations were understood in the wider context of the Sustainable Development Goals, the Commission might be able to consider going beyond draft principles 20 and 21 by exploring the possibility of including situations of prolonged occupation and the need to adopt measures that went beyond the mere management of natural resources and to incorporate an obligation to consult and involve the affected civilian population. The case law of the Inter-American Court of Human Rights might prove useful in that regard. He recalled that the Court had heard a number of cases involving the indigenous peoples of Guatemala and Paraguay.

He was in favour of referring draft principles 19 to 21 to the Drafting Committee.

*The meeting rose at 12.05 p.m. to enable the Drafting Committee on peremptory norms of general international law (*jus cogens*) to meet*